Pancaran Nilam (M) Sdn Bhd v Malayan Banking Bhd and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W-02-595 OF 1995 AND W-02-582 OF 1995
SHAIK DAUD, MOKHTAR SIDIN AND DENIS ONG JJCA
21 SEPTEMBER 2000

Land Law *— Charge — Equitable charge — Absolute assignment — Irrevocable power of attorney — Assignor defaulted in making repayments — Whether assignee can proceed to sell property under O 31 of Rules of the High Court 1980 — Rules of the High Court 1980 O 83*

Land Law *— Sale of land — Absolute assignment — Irrevocable power of attorney — Assignor defaulted in making repayments — Whether assignee can proceed to sell property under O 31 of Rules of the High Court 1980 — Rules of the High Court 1980 O 83*

The defendants purchased five units of apartment through loans granted by the plaintiff on the security of a loan agreement cum assignment over the sale and purchase agreements. It was not disputed that there was a power of attorney given by the defendants and that the assignments were absolute assignments. The defendants failed to service the loans. The plaintiff took out an originating summons pursuant to O 31 r 1 of the Rules of the High Court 1980 ('the RHC') against the defendants seeking to sell the property which were held as security for the loans. The defendants raised a preliminary objection that the prayer for sale under O 31 r 1 of the RHC as contained in the originating summons was not correct. It was submitted that the right procedure to sell the property should be under O 83 of the RHC. The judge overruled the preliminary objection and ordered that the property be sold by public auction, relying on *Hipparrion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149. The defendants appealed. It was submitted that pursuant to *Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157, the assignments by the defendants created equitable charges which could only be enforced by an application under O 83 of the RHC.

Held, dismissing the appeal:

An assignment (whether absolute or otherwise) is an equitable mortgage. But when it is an absolute assignment, it ranks higher than a charge and the property is transferred absolutely to the assignee when the assignor defaulted in making repayments. The assignee can proceed to sell the property under O 31 of the RHC. There is no harm if the assignee elects to sell the property under O 83 of the RHC. The plaintiff in the present appeal was right in applying for sale of the property under O 31 because of the absolute assignment and the irrevocable power of attorney. From the record, it was clear that the defendant did not dispute the fact that the assignment was an absolute

assignment. The trial judge was right in granting the order for sale under O 31 of the RHC (see pp 637I–638A, F–G). A

[Bahasa Malaysia summary

Defendan-defendan telah membeli lima buah unit apartmen melalui pinjaman yang diberikan oleh plaintif atas jaminan satu perjanjian pinjaman merangkap penyerahan hak ke atas perjanjian-perjanjian jual beli tersebut. Tidak dipertikaikan bahawa satu surat kuasa wakil telah diberikan oleh defendan-defendan dan penyerahan hak tersebut merupakan penyerahan hak yang mutlak. Defendan-defendan gagal untuk menyampaikan pinjaman-pinjaman tersebut. Plaintif telah mengeluarkan satu saman pemula menurut A 31 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap defendan-defendan memohon untuk menjual harta yang dipegang sebagai jaminan pinjaman-pinjaman tersebut. Defendan-defendan telah menimbulkan satu bantahan awal bahawa permohonan untuk menjual di bawah A 31 k 1 KMT sebagai mana yang terkandung di dalam saman pemula adalah tidak betul. Dihujahkan bahawa prosedur yang betul untuk menjual harta tersebut sepatutnya menurut A 83 KMT. Hakim telah menolak bantahan awal tersebut dan memerintahkan agar harta tersebut dijual melalui lelongan awam, berdasarkan *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149. Defendan-defendan telah merayu. Dihujahkan bahawa menurut *Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157, penyerahan hak tersebut oleh defendan-defendan membentuk gadaian berekuiti (equitable) yang hanya boleh dikuatkuasakan melalui satu permohonan di bawah A 83 KMT. B C D E F

Diputuskan, menolak rayuan tersebut:

Satu penyerahan hak (sama ada mutlak atau sebaliknya) adalah satu gadai-janji berekuiti. Tetapi apabila ia satu penyerahan hak yang mutlak, ia diletakkan lebih tinggi daripada satu gadaian dan harta tersebut dipindahkan keseluruhannya kepada pemegang serahhak apabila penyerahhak gagal membuat pembayaran balik. Pemegang serahhak boleh meneruskan jualan harta tersebut di bawah A 31 KMT. Ia tidak mendatangkan mudarat sekiranya pemegang serahhak memilih untuk menjual harta tersebut di bawah A 83 KMT. Plaintif di dalam rayuan ini betul dalam memohon penjualan harta di bawah A 31 kerana penyerahan hak mutlak dan surat kuasa wakil yang tak boleh batal. Berdasarkan laporan tersebut adalah jelas bahawa defendan tidak mempertikaikan fakta bahawa penyerahan hak tersebut adalah satu penyerahan hak yang mutlak. Hakim perbicaraan adalah betul dalam memberikan perintah jualan di bawah A 31 KMT (lihat ms 637I–638A, F–G).] G H I

A **Notes**

For cases on equitable charge, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1613–1615.

For cases on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2833–3271.

B **Cases referred to**

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (refd)

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)

C *Koperasi Rakyat Bhd v Harta Empat Sdn Bhd* [2000] 3 MLJ 83 (refd)

Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)

Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157 (refd)

Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590 (refd)

D **Legislation referred to**

Civil Law Act 1956 s 4(3)

Rules of the High Court 1980 O 31 rr 1, 4, O 83

E **Appeal from:** Originating Summons No S4–24–669 of 1994 (High Court, Kuala Lumpur)

Satharuban Sivasubramaniam (*Satha & Co*) for the appellant in Civil Appeal No W–02–595 of 1995.

Ramdas Tikamdas (*Siva Ram & Associates*) for the appellant in Civil Appeal No W–02–582 of 1995.

F *Shamsul Bahrain bin Ibrahim* (*Samad Din & Partners*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court): These two appeals were heard together. It is clear to us that these appeals originated from the same originating summons, namely Saman Pemula No S4–24–669–1994. From the record it is clear to us that the learned trial judge heard the G originating summons as one and gave only one decision and one ground of judgment. Because of that it is more convenient for this court to hear the two appeals together. In order to avoid any confusion we will refer to the parties as they were in the court below.

The first defendant through five separate sale and purchase agreements H ('the said sale and purchase agreements') purchased five units of apartments at D'Village Condominium erected on a piece of land held under main title known as Geran No 11011, Lot No 36, Section 51, Bandar Kuala Lumpur from Navistar Sdn Bhd and Syarikat Trimal Sdn Bhd. The five units are known as:

I (1) Unit No 07-2C/I/G, 7th Floor, Block I;

(2) Unit No 09-2B/II/B, 9th Floor, Block II;

(3) Unit No 13-2B/II/B, 13th Floor, Block II;

(4) Unit No 13A-2B/II/B, 13Ath Floor, Block II; and

(5) Unit No 08-2B/II/I, 8th Floor, Block I.

The strata titles to these properties have not been issued. In order to finance the said purchase, the first defendant took up a term loan of RM600,000 from the plaintiff to be repaid within ten years by monthly instalments of RM7,706. As security for the said loan both the first defendant and the plaintiff entered into a loan agreement cum assignment with power of attorney to transfer or deal otherwise with the five units of apartments. Subsequent to that the term loan was increased from RM600,000 to RM700,000 repayable by monthly instalments of RM8,694 under the same terms and conditions originally given.

In November 1990, the plaintiff approved the following banking facilities to the second defendant:

(1) letter of credit (sight) trust receipts (90) days of RM2m;

(2) trust receipt to include financing of d/p bills subject to sub-limit of RM500,000; and

(3) foreign exchange contract (spot & forward) of RM2m.

The security for the said facilities given was a loan agreement cum assignment over the said sale and purchase agreements with a power of attorney clause to transfer or deal otherwise with the subsequent second legal charge for the RM1m when strata titles are available.

On 19 November 1990, the plaintiff granted a second loan in the sum of RM700,000 to the first defendant. As security for this loan a loan agreement cum assignment ('the said agreement') was executed between the plaintiff and the first defendant whereby the first defendant absolutely assigned to the plaintiff all its rights and interest in and to the above stated properties together with the full and entire benefit of the said sale and purchase agreements. Contemporaneously with the said agreement, the first defendant also executed a power of attorney whereby the first defendant appointed irrevocably the manager of the plaintiff bank for the time being as the attorney of the first defendant.

It is to be noted that on 8 August 1992, the defendants sold Unit No 08–2B/II/I, 8th Floor, Block I for the sum of RM245,000. It was alleged by the plaintiff that the unit was sold without its consent. Whether it is sold without consent or otherwise is not the concern of this appeal. As such, only four units remained ('the said property') as security for the loan and the facilities given which are the subject matter of these appeals.

The defendants failed to service the loans and the facilities. On 12 October 1992, the plaintiff through its solicitors demanded full payment of the loans and the facilities given to both defendants. The defendants failed to make any payment. As a result, on 22 August 1994 the plaintiff took out the originating summons against both defendants seeking to sell the said property which were held as security for the said loans and facilities. The originating summons were taken out pursuant to O 31 r 1 of the Rules of the High Court 1980 ('the RHC'). In the originating summons the

A plaintiff prayed that an order be given that the said property Unit No 07–2C/I/G, 7th Floor, Block 1; Unit No 09–2B/II/B, 9th Floor, Block II; Unit No 13–2B/II/B, 13th Floor, Block II and Unit No 13A–2B/II/B, 13Ath Floor, Block II in blocks of apartments called D'Village Condominium be sold by public auction.

B Both defendants entered appearance. At the hearing of the originating summons the defendants raised a preliminary objection on the ground that the prayer for sale under O 31 r 1 of the RHC as contained in the originating summons was not correct. It was submitted by counsel for both defendants that the right procedure to sell the said property should be under O 83 of the RHC. The learned judge overruled the preliminary objection by the C defendants and ordered that the said property be sold by public auction. The learned judge also ordered the defendants to pay costs.

Being dissatisfied with that decision the defendants now appeal to us. In her judgment dismissing the preliminary objection, the learned judge came to the conclusion that this was not a charge action where O 83 of the D RHC applied. She was of the opinion that the originating summons was an application by an assignee exercising its contractual remedy against the assignor in default. The assignee was suing for a debt, and its claim for an order for sale was based upon a covenant. Furthermore, the securities given were in the form of a power of attorney as well as security relating to chose in action that was an assignment of the first defendant's rights, benefits and E interest in and under the loan agreement cum assignment, to wit four units of apartments, strata titles in respect of them. She relied on the decision of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149.

Before us, the defendants adopted the same contention. The counsel for the defendants relied heavily on the decision of this court in *Phileo Allied* F *Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157. It is to be noted when the decision in respect of these appeals were given, the learned judge did not have the benefit of the decision in *Phileo Allied Bank (M) Bhd.*

Before us it was contended by the defendants that following the G decision of *Phileo Allied Bank (M) Bhd*, the assignments by the defendants created equitable charges which could only be enforced by an application under O 83 of the RHC. Now, in that case, the plaintiffs (*Bupinder Singh a/l Avatar Singh & Anor*) entered into a loan agreement cum assignment with the bank, in order to help finance the plaintiffs' purchase of a property. No strata title had been issued in respect of that H property. Upon the plaintiffs' failure to service the required monthly repayments, the bank demanded repayment of the entire loan facility. The bank then took steps to sell the property by way of a public auction without giving any notice to the plaintiffs. The plaintiff applied for an injunction to prevent the bank from selling and/or transferring by public auction, or otherwise from disposing of the property. It was contended by the plaintiffs I in that case that since the assignment of the property constituted an absolute assignment of rights of a borrower to a financier where there is no title issued, the appropriate procedure that the bank ought to have adopted

was to commence proceedings under O 31 of the RHC. Alternatively, it was submitted, if the court was to hold that the assignment as not an absolute assignment, then the bank ought to have commenced the proceedings under O 83 of the RHC. The defendant in that case argued that it had an unfettered right to proceed to auction the property pursuant to the powers granted to it under a power of attorney. In that case, the High Court, following the decision of *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590, held that when there is an absolute assignment of rights by a borrower to a financier and no title is issued, the appropriate procedure to be adopted by the financier to sell the property concerned would be to commence proceedings under O 31 r 1 of the RHC. Being dissatisfied withthat decision the bank appealed. In the Court of Appeal, Gopal Sri Ram JCA, delivering the judgment of the court at pp 162–163 identified the issue as follows:

> A short but important point of law has been raised in this appeal. At issue is the broad question whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

At p 165 the learned judge said:

> The judgment under appeal
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> In holding for the respondents, the learned judge proceeded upon three main grounds. First, it appears that he held that the power of attorney given by each respondent was invalid. I say 'appears' advisedly because the learned judge did not make a specific finding that the powers of attorney were invalid. What he did say was that he doubted their validity because the certificate of authentication in respect of each preceded the date of its grant by several months. However, when read in its proper context, what he obviously meant was that it was not open to the appellant to rely upon the powers of attorney to sell the subject property by public auction. ...
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> Second, the learned judge, having held the assignment to be absolute, went on to hold that it was therefore incumbent for the appellant to apply for and obtain an order for sale pursuant to O 31 r 1(1) of the RHC 1980 ('the RHC'). The learned judge arrived at the latter conclusion based on his interpretation of the decision in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 (affirmed by the Supreme Court, sub nom *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149) and *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590. He thought that these cases were authority for the proposition that a lender similarly circumstanced as the appellant, notwithstanding an express power of sale reserved to him in the contract of loan, can realize his security through a judicial sale. Third, the learned judge held that even if he were to hold the assignment not to be absolute, it created an equitable charge which was only enforceable by resort to the procedure laid down in O 83 of the RHC.
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> In essence, the second and third findings of the learned judge constitute his reasons for resolving the sole issue in this case, identified very early in this judgment, in the respondent's favour. Before us, the appellant attacked both findings. It therefore becomes necessary, in order to determine the sole issue in the appeal, to address separately each reason advanced by the learned judge.

In the present appeal, it is clear to us that the defendants conceded that there was a power of attorney given by the defendants and that the assignments were absolute assignments. The defendants also conceded that the plaintiff has the right to go to the court to get an order of sale of the said property. The only complaint was that the plaintiff was wrong in seeking to sell the said property under O 31 r 1 of the RHC. The proper procedure should be under O 83 of the RHC. It was submitted by counsel for the defendants that *Phileo Allied Bank (M) Bhd* makes it clear that an assignment whether absolute or otherwise, is an equitable mortgage which under our law is known as an equitable charge. The learned counsel cited to us the passage by Gopal Sri Ram JCA at p 182:

> *Chuah Eng Khong v Malayan Banking Bhd*, being a decision of the present Federal Court, is plainly binding upon this court in accordance with the doctrine of precedent. I think this court is equally obliged to accept the decision in *Malayan Banking Bhd v Zahari bin Ahmad* as it appears to have been approved sub silentio by the Federal Court in *Chuah Eng Khong*. Accordingly, I must respectfully decline Mr Royan's invitation to treat these cases as wrongly decided. These cases are authority for the proposition that an absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage.
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> In the present instance, it was found by the learned judge and is common ground before us that the assignment is an absolute assignment of the respondents rights over the subject property to the appellant. The assignment therefore falls squarely within the proposition stated a moment ago. Accordingly, it is an equitable mortgage, also known as an equitable charge in the context of our jurisprudence. On this ground alone, I must reject the appellant's contention that the assignment does not amount to an equitable charge.

We agree with the learned counsel for the defendants in the present appeal that the assignment being an absolute assignment is an equitable charge. But then the learned counsel for the defendants went one step further when he submitted that since the assignment is an equitable charge then the proper procedure for the plaintiff to follow in order to sell the said properties should be under O 83 of the RHC. According to the learned counsel, O 83 of the RHC is the correct and only procedure to be followed. Since the originating summons seeking to sell the land was under O 31 r 1 of the RHC that procedure is wrong and it is fatal. He cited several passages from the judgment of Gopal Sri Ram JCA in *Phileo Allied Bank (M) Bhd* where at pp 184–185 he said:

> That brings me to the next question. Does the fact that the assignment is an equitable mortgage preclude the appellant from exercising its contractual power of sale. As I earlier mentioned, Mr Royan with his customary frankness, conceded that the question must be resolved against his client. He said that once this court accepted that the assignment was an equitable charge, the appellant could only sell the subject property under the authority of an order of the court obtained pursuant to O 83 RHC. This concession of counsel must now be tested for its accuracy, and if found to be correct, must be accepted.

The starting point for this exercise is an examination of O 83 rr 1(1) and (2) RHC of which read as follows:

> (1) This order applies to any action (whether begun by writ or originating summons) by a charge or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs, namely —
>
> (a) payment of moneys secured by the charge;
> (b) sale of the charged property;
> (c) foreclosure;
> (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;
> (e) redemption;
> (f) reconveyance of the property or its release from the security;
> (f) delivery of possession by the chargee.
>
> (2) In this Order 'charge' includes a legal and an equitable charge.

A lender who has a charge (which by reason of r 1(2) includes an equitable charge) must adopt the procedure laid down by O 83 RHC if he wishes to enforce his security. That, I think, is made abundantly clear by the opening words of O 83 r 1(1) RHC . The lender is required to make an application by originating summons supported by an affidavit. He must serve the cause papers upon the chargor who is entitled to appear and be heard on the application. The chargor may oppose the lender's application on any of the admissible grounds. Or he may apply for redemption of the security. He may, if he fails at first instance, appeal to this court. His right to appeal is a substantive and not merely a procedural right. See *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. If he fails before this court, he may seek leave of the apex court to prosecute a further appeal.

It follows from what I have said thus far that the right, title and interest of a chargor in the charged property may not be extinguished save in accordance with the procedure prescribed by the RHC and after the chargor has exhausted his substantive rights of appeal. This is entirely consonant with the concept of fairness which lies at the heart of our justice system. When viewed in this fashion, it is clear to my mind that RHC O 83 is a procedural law that serves to protect the interests of a chargor.

Further down at p 187, Gopal Sri Ram JCA said:

While preparing this judgment, a point occurred 'to me which I think I ought to mention for completeness. It has to do with the contractual power reserved to an equitable chargee in a deed of assignment to take possession of the charged property without an order of court. Such a power would, in my judgment, be void because it would prima facie run counter to the overall purpose of O 83 RHC which requires a chargee (whether registered or equitable) to move the court for an order for possession and, in such event, to comply with certain pre-requisites. This is apparent from the first three sub-rules to r 3 or O 83 RHC which read as follows:

> (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.

A This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and *claims delivery of possession* or payment of moneys secured by the charge or both.

(2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

B (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —

(a) the amount of the advance;

(b) the amount of the repayments;

C (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge. (Emphasis added.)

Yet, in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd*, Edgar Joseph Jr J at first instance, upheld the plaintiff bank's exercise of its contractual power to terminate the defendant borrower's occupational licence and to enter upon D the property in question and to deal with all its rights, title and interest in that property. It is apparent from his Lordship's judgment that counsel for *Hipparion* did not argue against the validity of the covenant for possession in the bank's favour. Neither was the point canvassed in the subsequent appeal to the Supreme Court. Hence, it finds no mention in the judgment of that court.

E As we have stated earlier the defendants in the present appeal relied strongly on this especially in the statement by Gopal Sri Ram JCA at p 186 where he said:

In *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd*, the F Federal Court declared void a contractual power reserved in favour of a *registered* chargee to effect a sale of charged property on the ground that the express foreclosure provisions of the National Land Code could not be contracted out of or waived by the chargor. In my judgment, policy dictates that such a power in favour of an equitable chargee should be treated no differently. For otherwise, an equitable chargee would be placed in a better position than a registered chargee. Consequently, equality in treatment and G parity of result is achieved by holding that an equitable chargor may not contract out of or waive the requirements of O 83 of the RHC. Such a conclusion will in my view, prevent lenders from by-passing the requirements under the National Land Code, through the creation of equitable chargee, in order to gain an advantage they would clearly lack under statute.

H It was contended by the defendants that this passage made it very clear that the procedure to realise any security under an equitable charge is in accordance with O 83 of the RHC. The chargee has no choice but to do so. Counsel for the defendants submitted further that the reason why O 83 must be adopted is to enable the chargor to redeem the property before the order of sale is granted.

I On the other hand counsel for the plantiff in the present appeal relied strongly on the decision of the then Supreme Court in *Hipparion (M) Sdn Bhd*. In that case the plaintiff, a licensed bank, had on 3 September 1983

entered into an agreement with the defendant, whereby the plaintiff granted a loan of RM1m to the defendant repayable with interest thereon at the rate of 13.5% pa or at such rate as the plaintiff may specify, from time to time, in accordance with the terms and conditions specified in the said agreement. It was also provided in the said agreement that the defendant would remain in possession of a property known as the third floor of a building standing on holding 355, to a subdivision 14, north-east district, Penang, as a contractual licensee only of the plaintiff. It was further provided in the said agreement that in the event of default by the defendant of one or more of the instalment payments covenanted to be made in the manner provided, the plaintiff was to be at liberty to demand immediate payment of the balance, and in the event of any part of the same remaining unpaid after 14 days from the date of such demand, the plaintiff would have the right to terminate the licence of the defendant by notice in writing and to enter upon the property and to deal with all its rights, title and interest as owner thereof in all respects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer such right, title and interest at such price and in such manner and subject to such conditions as the plaintiff shall in its absolute discretion deem fit, free from any interest of the defendant. By way of security for the loan the defendant also executed a deed of assignment dated 3 September 1983 whereby it assigned absolutely to the plaintiff all its rights, title and interest in the said property and, in respect of a sale and purchase agreement dated 13 April 1981 whereby the defendant had bought the same property from a company called Penang Garden Sdn Bhd. The defendant defaulted in making payments due under the said agreement and the plaintiff through its solicitors issued a notice in writing on 14 August 1985 demanding repayment of the loan together with accrued interest thereon within 14 days from the date of demand. The plaintiff further issued another notice in writing that if its demand aforesaid was not complied with, it would exercise its rights of sale over the property. The plaintiff commenced proceedings by way of originating summons seeking a declaration that the sum due and owing by the defendant and also an order under O 31 r 1 that the said property be sold by public auction and/or by private treaty.

In the High Court, Edgar Joseph Jr J (as he then was) [1988] 2 MLJ 62 at pp 64–65 said:

> The defendant's right to possession of the property vis-a-vis the developer is an incident of his rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment. Thereafter, the defendant's right to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff. As has already been noted by cl 12(a) of the loan agreement, the plaintiff was entitled by written notice to terminate such licence in the event of default by the defendant in making the payment specified therein. There having been such default by the defendant — and as to this there never has been any dispute — the plaintiff had lawfully exercised its right to terminate the licence and, in the words of the loan agreement, was entitled 'to enter upon' the property 'and to deal with all the right, title and interest of the

bank in relation to or in, as the case may be' the property 'arising out of the beneficial ownership by the bank of' the property 'or the registration of the bank as the owner of' the property 'or, otherwise, in all respects as the person absolutely and beneficially entitled thereto ...'.

If, on the other hand, the security constituted by the documents concerned is a security relating to land, it is still a valid security. The requirements of the National Land Code, which concern the creation of a security in respect of land held under registered title, are without application in the present case, as the property is not as yet held under a registered title. In this context, s 205[(i)] of the National Land Code is relevant and provides as follows:

> 'The dealings capable of being effected under this Act with respect to alienated lands and interest therein shall be those specified in Parts Fourteen to Seventeen and no others.'

For the definition of the expression 'alienated land', I would refer to s 5 of the National Land Code which describes 'alienated land' as 'any land (including any parcel of subdivided building) in respect of which a registered title for the time being subsists'. Then, s 206(3) of the National Land Code serves to remind us that 'nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein'. It follows, therefore, that the defendant's submission that a claim to enforce a security given by way of assignment cannot put the claimant in a better position than one who seeks to enforce a charge registered as a Form 16 charge under the National Land Code is untenable.

Looking back, I would hold that the assignment was not by way of charge only but an absolute assignment. The letter of offer dated 9 August 1983, exhibited to the affidavits of Chean Ah Bee, the secretary of the defendant, affirmed to on 25 March 1987 (encl 12) and the charge in escrow referred to in the letter of offer merely demonstrated that the assignment was by way of security designed to give the defendant an equitable right of re-assignment upon repayment of the loan secured thereby. It has been settled by plentiful authority that an assignment in such circumstances is nonetheless absolute. ...

Then, further down at p 66 his Lordship concludes as follows:

> Accordingly, the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, strata title, in respect of which is yet to be issued, this court has jurisdiction under s 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property consequential thereto.
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> If, contrary to my primary opinion, the security herein is not a security relating to a chose in action but a security relating to land, then I would hold that this court has jurisdiction under O 31 r 1(1) of the Rules of High Court 1980 (adapted from O 51 of the English Rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham v Stringer*.

Being dissatisfied with that decision, the defendant in that case appealed to the then Supreme Court. The Supreme Court dismissed the appeal (see [1989] 2 MLJ 149). At p 151, Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court said:

We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank*'s case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself'. Now, whatever the parties might have as laymen stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn Bhd of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of RM1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:

> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee, all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document *we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property.* As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of counsel that an equitable charge was made in this case. (Emphasis added.)

In our view the Supreme Court made it very clear that when there is an absolute assignment there is no necessity for the court to determine whether an assignment is an equitable charge or not. The determination of the assignment to be an equitable charge is for the purpose of bringing that assignment to be a charge within the meaning of s 4(3) of the Civil Law Act 1956. Where the assignment is an absolute one the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. In other words the rights, title and interest of assignor in respect of property under the sale and purchase agreement is transferred to the assignee. As such the assignee can do anything to the property once notice of default and notice to remedy has been given to the assignor. The Supreme Court made it clear that 'a document given 'by way of charge' is not one which absolutely transfers the property'. As such an absolute assignment is in a stronger position than a charge. For those reasons the Federal Court decided that a sale of property under an absolute assignment by way of O 31 of the RHC was the proper and correct procedure.

A In the present appeal it is clear to us that there is no dispute that the assignment was an absolute assignment. The facts in this appeal if not identical are similar to the facts in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149. That decision, being a Supreme Court (the then Federal Court) decision, is binding on this court. It is to be noted that *Phileo Allied Bank* is a decision of this court. Further, the facts in B *Bupinder Singh a/l Avatar Singh & Anor* were different in that the bank in that case did not obtain an order of the court for the sale of the subject property. For that reason the owner challenged the sale and succeeded. It is true that the Supreme Court did not decide that an absolute assignment is not an equitable charge as pointed out by Gopal Sri Ram JCA but what was C pointed out by the Supreme Court was that an absolute assignment ranked higher than a charge because a charge is not one which absolutely transfers the property if the chargor defaulted whereas in the case of an absolute assignment the property is transferred absolutely when the assignor defaulted. In our view the conclusion by Gopal Sri Ram JCA in *Bupinder Singh a/l Avatar Singh & Anor*:

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> ... In my judgment, policy dictates that such a power in favour of an equitable chargee should be treated no differently. For otherwise, an equitable chargee would be placed in a better position than a registered chargee. ...

is not applicable in the case of an absolute assignment as pointed out by the Supreme Court in *Hipparion (M) Sdn Bhd.*

E Counsel for the appellant also cited *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 to support his contention. The issue in that case was totally different from the issue in the present appeal. The issue in that case was whether the loan agreement was tantamount to an equitable mortgage and the bank is entitled to claim the interest accruing under the F loan agreement. In the present appeal, the issue is whether the respondent was right in going under O 31 of the RHC to effect sale of the subject property. The appellant also cited *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135. This is a High Court decision. That case could easily be distinguished from the present appeal in that there was no absolute assignment. The claim by the bank is based entirely on a loan agreement. G As stated in the case of *Bupinder Singh a/l Avatar Singh & Anor* to which we agree such document tantamount to an equitable charge and the proper procedure to sell the land is under O 83 of the RHC and not under O 31 of the RHC. In *Mehadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, the issue was whether an equitable charge could be created on H the property of a deceased person for money advanced to him in his lifetime which was not repaid. As such it is not relevant to the present appeal. Appellant also cited the recent decision of the Federal Court in *Koperasi Rakyat Bhd v Harta Empat Sdn Bhd* [2000] 3 MLJ 83. Again we find that, that case has no application to the present appeal because the issue in that case was a third party charge.

I As such it is clear to us that an assignment (whether absolute or otherwise) is an equitable mortgage as decided by *Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157. But when

it is an absolute assignment it ranks higher than a charge and the property is transferred absolutely to the assignee when the assignor defaulted in making repayments. The assignee can proceed to sell the property under O 31 of the RHC (see *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149). We wish to add that in our view there is no harm if the assignee elects to sell the property under O 83 of the RHC.

Another issue taken up by the appellants was that if the sale is to be proceeded under O 31 of the RHC, then the appellants were put at a great disadvantage in that they would not have the opportunity to redeem the property as provided for by O 83 of the RHC. We are not impressed with this argument. It is clear to us that in the present appeal the respondent as assignee had given the proper notice of default and redemption to the appellants. Appellants failed to make good of the amount due. Perusing O 31 and O 83 of the RHC it is clear to us that distinction between the two orders is that under O 83 there is a requirement for the chargee to claim possession first before an order for sale. This is what Gunn Chit Tuan SCJ (as he then was) in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* said (at p 151): '... A document 'given by way of charge' is not one which absolutely transfers the property, ... '.

As to the order for sale itself it is clear to us that whatever conditions and directions as to the sale which are applicable to O 31 of the RHC are applicable to a sale under O 83 of the RHC. This is so by virtue of O 31 r 4 of the RHC which provides:

> Charge, exchange or partition under order of the court
>
> Rules 2 and 3 shall, so far as applicable and with necessary modifications, apply in relation to the charge, exchange or partition of any immovable property under an order of the court as they apply in relation to the sale of any immovable property under such an order.

Thus, even if the sale is to be made under O 83 of the RHC the manner of carrying out the sale and certifying result of the sale shall be in accordance with O 31 rr 2 and 3 of the RHC.

We are of the view that the plaintiff in the present appeal was right in applying for sale of the property under O 31 of the RHC because of the absolute assignment and the irrevocable power of attorney. From the record it is clear that the defendant did not dispute the fact that the assignment was an absolute assignment. The learned trial judge was right in granting the order for sale under O 31 of the RHC. The appeal is hereby dismissed with costs. Deposit to account of taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar